158

158-441

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~847~~. 88

WILLIAM M. BENNETT, FOR HIMSELF AND AS ADMINISTRATOR OF M. H. GIBBONS, DECEASED, PLAINTIFF IN ERROR,

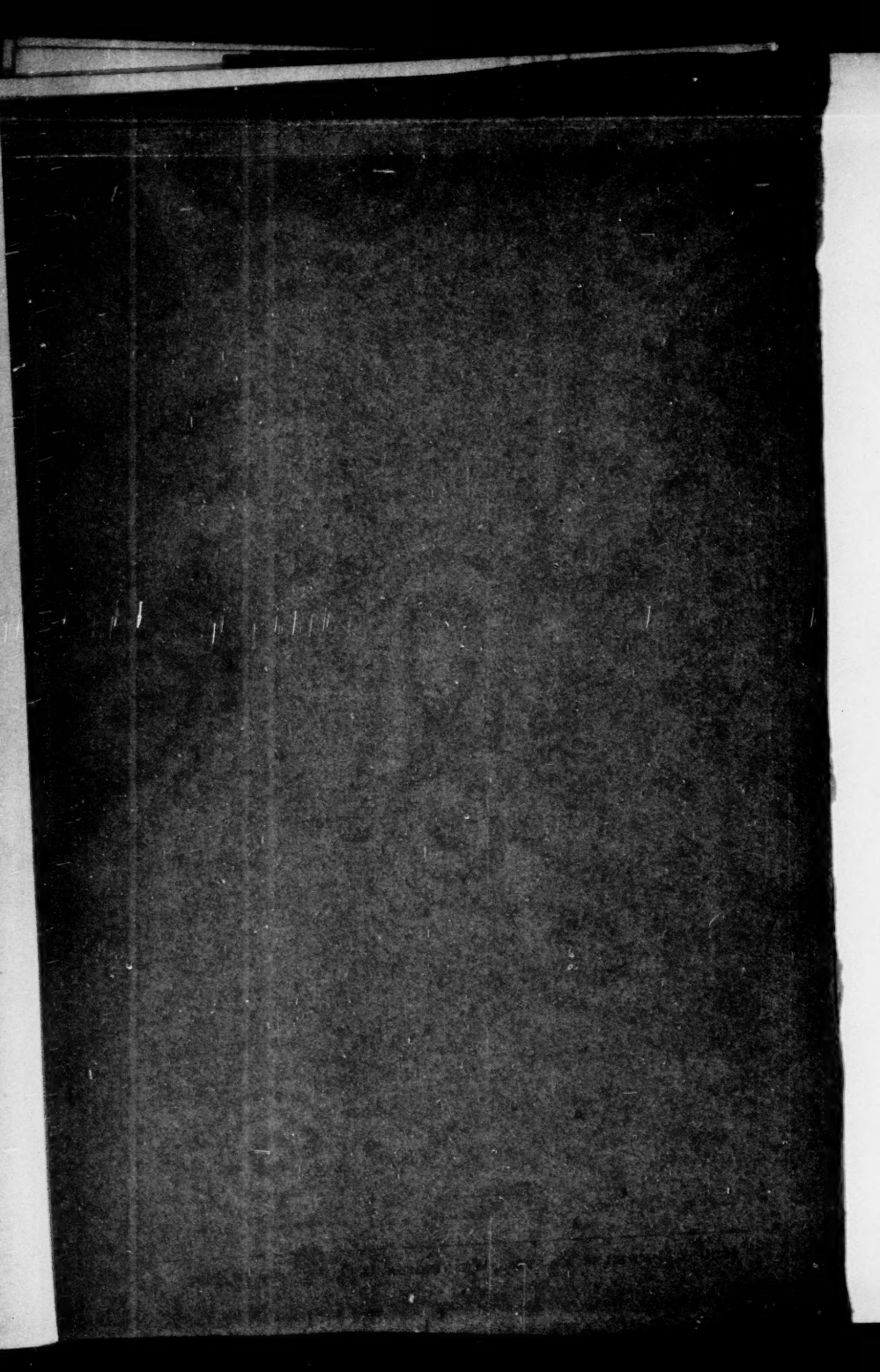
vs.

GEORGE HARKRADER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

FILED NOVEMBER 7, 1890.

(14,411.)



(14,411.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. 347.

WILLIAM M. BENNETT, FOR HIMSELF AND AS ADMINISTRATOR OF M. H. GIBBONS, DECEASED, PLAINTIFF IN ERROR,

vs.

GEORGE HARKRADER.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

INDEX.

	Original.	Print.
Caption	1	1
Summons	2	1
Marshal's return	3	1
Stipulation as to record	4	2
Amended complaint	5	2
Amended answer	10	4
Reply	15	5
Order calling jury, &c.	17	6
Bill of exceptions	18	6
Exhibit A—Location certificate, April 8, 1881	18	6
B—Location certificate, March 19, 1881	19	6
C—Location certificate, March 19, 1881	20	7
Statement of evidence for plaintiff	21	7
Statement of evidence for defendant	22	8
Defendant's requests	24	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JANUARY 18, 1894.

	Original.	Print.
Instructions given	25	9
Verdict	28	9
Motion for new trial	28	9
Judge's certificate to bill of exceptions	29	10
Bond	30	10
Affidavit of value	33	11
Clerk's certificate	34	11
Writ of error	35	12
Citation	38	12
Proof of service of citation	39	13

1 In the United States District Court in and for the District of Alaska.

GEORGE HARKRADER
vs.
WILLIAM M. BENNETT, for Himself and as Administrator of the Estate of M. Gibbons, Deceased. } No. 115.

2 In the District Court of the United States for the District of Alaska.

GEORGE HARKRADER
vs.
W. M. BENNETT, for Himself and as Administrator of the Estate of M. Gibbons, Deceased. } No. 115. Summons.

The President of the United States of America to William M. Bennett, the above-named defendant, Greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Juneau, in said district, and answer the complaint filed against you in the above-entitled action on the third Monday of May, 1888, being the 21st day of May, or as soon thereafter as court may convene at Juneau, — days from the date of the service of this summons upon you, and if you fail so to appear and answer for want thereof the plaintiff will take judgment against you for the relief demanded in the complaint.

3 And this is to command you, the marshal of said district, or your deputy to make due service and return of this summons. Hereof fail not.

Witness the Honorable La Fayette Dawson, judge of said district court, and the seal of said court, affixed at Sitka, in said district, this 24 day of February, 1888.

[SEAL.] H. E. HAYDON, *Clerk.*

[Endorsed:] No. 115. In the district court of the United States for the district of Alaska. George Harkrader *vs.* W. M. Bennett *et al.* Summons. Returned and filed March 10th, 1888. H. E. Haydon, clerk.

UNITED STATES, *District of Alaska,* } *ss:*

I, Barton Atkins, United States marshal for the district of Alaska, hereby certify and return that the within summons came into my hands for service on the 25th day of Feb'y, 1888, and that I personally served the same at Juneau, in said district of Alaska, on the 25th day of February, 1888, by delivering to William M. Bennett, the defendant herein, a true copy of the within, together with a certified copy of the complaint.

BARTON ATKINS,
U. S. Marshal,
By LOW SMITH,
Special Dep'ty U. S. Marshal.

4 United States District Court, District of Alaska.

GEORGE HARKRADER, Plaintiff,
vs.
WILLIAM M. BENNETT, for Himself and as Administrator of the Estate of M. H. Gibbons, Deceased, Defendant. } Stipulation.

It is hereby stipulated and agreed that the clerk of said court, in making up the record for the Supreme Court of the U. S. in the above case, may copy in said record as constituting the whole of the pleadings only the following: The plaintiff's amended complaint, the defendant's amended answer, and the plaintiff's reply, and that said reply shall stand as the reply to said amended answer.

JNO. J. BUNSTINE,
JNO. G. HEID,
Defendant's Att'ys.
A. K. DELANEY,
Pl'ff's Att'y.

5 United States District Court, District of Alaska.

GEORGE HARKRADER, Pl'ff,
ag'st
WILLIAM BENNETT, for Himself and as the Administrator of the Estate of M. Gibbons, Deceased, D'f't. } Amended Complaint.

The plaintiff in the above-entitled action, for amended complaint, show- to the court:

I. That the plaintiff is the owner and on the 10th day of December, A. D. 1887, was lawfully possessed of and now is entitled to the possession of those certain placer mining claims situate, lying, and being in Silver Bow basin, Harris mining district, district of Alaska, know- as the Bulger Hill and Nugget Gulch placer
6 mining claims; that the said Bulger Hill placer mining claims aforesaid are described as follows, to wit: Commencing at post No. 10 of the U. S. survey, known and recorded as the Bulger Hill survey, whence United States mineral monument No. 2, duly established by United States survey and recorded as a permanent monument, bears north seventy-six degrees (76°) east eleven hundred and seventy-eight (1,178) feet; thence running north thirty-four degrees and forty-five minutes (34° 45′) east one thousand (1,000) feet to angle No. 1; thence running south twenty-two degrees (22°) east two hundred (200) feet to angle No. 2; thence south forty-one degrees and thirty minutes (41° 30′) east five hundred and ninety-four (594) feet to angle No. 3; thence running south thirty-seven degrees and thirty minutes (37° 30′) west nine hundred and ninety (990) feet to angle No. 4; thence north thirty-six degrees and fifteen minutes (36° 15′) west seven hundred
7 and thirty-seven (737) feet to place of beginning. That the grounds of the said Nugget Gulch placer claim constitute a

part of the said Bulger Hill placer claims above described, and is more particularly described as follows, to wit: Commencing at angle No. 2, mentioned and described in the foregoing boundaries of the Bulger Hill placer claims, thence running south forty-one degrees and thirty minutes (41° 30′) east two hundred (200) feet; thence south fifty-seven degrees and forty-five minutes (57° 45′) west two hundred and thirty-eight (238) feet; thence south thirty-nine degrees (39°) west five hundred and sixty-two (562) feet; thence running north forty-one degrees and thirty minutes (41° 30′) west two hundred (200) feet; thence north thirty-nine degrees (39°) east five hundred and sixty-two (562) feet; thence run-
7½ ning north fifty-seven degrees and forty-five minutes (57° 45′) east two hundred and thirty-eight (238) feet to place of beginning.

II. That the said plaintiff and his grantors have been in the quiet and peaceable possession of the said placer mining claims since the 8th day of April, A. D. 1881, up to the 10th day of December, A. D. 1887.

III. That on or about the 10th day of December, A. D. 1887, aforesaid the said defendant wrongfully and unlawfully entered upon and took possession of the said described placer mining claims and ousted the plaintiff, and now wrongfully and unlawfully withholds possession thereof from the plaintiff, to his damage in the sum of five hundred dollars.

Wherefore the plaintiff prays judgment against the de-
8 fendant ejecting him from the said premises and giving this plaintiff restitution thereof, and also for the sum of five hundred dollars damages, together with the costs and disbursements of this action.

A. K. DELANEY AND
A. H. GAMEL, *Pl'ff's Att'ys.*

UNITED STATES OF AMERICA, }
District of Alaska. }

I, A. K. Delaney, being duly sworn, depose and say that I am one of the attorneys for the plaintiff in the foregoing-entitled action and have read the foregoing complaint and know the contents thereof, and that all the material allegations of the said complaint are within the personal knowledge of this deponent; that the reason this verification is made by me as such attorney is that, as I verily believe, the plaintiff is now at or near Juneau, in the
9 said district of Alaska, a distance of one hundred and seventy miles or thereabouts from Sitka, and that it is impossible to reach the said plaintiff in time to procure his verification to the said complaint so as to file the same within the time granted by the court herein for plaintiff to file his amended complaint, and that, as I verily believe, the said complaint is true.

A. K. DELANEY.

Subscribed and sworn to before me this Oct. 30, A. D. 1888.
[SEAL.] H. E. HAYDON, *Clerk.*

10 United States District Court, District of Alaska.

GEORGE HARKRADER, Plaintiff,
vs.
WILLIAM M. BENNETT, for Himself — as Executor of the Estate of M. H. Gibbons, Deceased, Defendant.
} Amended Answer.

The said defendant, for himself and as administrator of the estate of M. H. Gibbons, deceased, for an amended answer, answers to the plaintiff's complaint filed herein.

The said defendant denies each and every material allegation in the plaintiff's complaint contained.

Denies that the plaintiff is now, was at the commencement of this action, or at any other time the owner and entitled to the possession of the premises in his complaint described.

11 Denies that he, said defendant, on the 10th day of December, A. D. 1887, or at any other time entered upon and took possession of and withholds from said plaintiff any premises belonging to plaintiff or to which plaintiff was on said 10th day of December or at any time before or since then entitled to possess.

Denies that he ousted plaintiff therefrom and that the plaintiff was or is damaged in the sum of five hundred dollars or any part thereof.

For further defense this defendant answers that on the 9th day of April, A. D. 1881, defendant's grantors, by virtue of a compliance with the mining laws of the United States and the miners' rules and regulations then and now in force in Harris mining district, in said district of Alaska, located and thereby became

12 entitled to the possession of a certain lode mining claim, more particularly described as follows, to wit: A certain lode mining claim fifteen hundred feet in length and six hundred feet in width, known as the "Aurora mine," and situated on the southwest side of Silver Bow basin, Harris mining district, Alaska—that is to say, beginning at post No. 1, thence north 56° 31′ E. 300 feet to post No. 2, whence United States mineral monument No. 2 bears north 74° 30′ E. 283 feet distant; thence north 36° 00′ W. 488 feet to post No. 3, thence north 24° 15′ W. 1,012 feet to post No. 4, thence south 56° 30′ W. 300 feet to post No. 7, thence south 40° 00′ E. 488 feet to post No. 8, thence north 56° 30′ E. 230 feet to post No. 1, the place of beginning, courses expressed from true meridian, magnetic variation 30° 00′ E.

13 That said location was made for mining purposes and by virtue of the laws of the United States and the miners' rules and regulations in force in said Harris mining district.

That ever since said 9th day of April, A. D. 1881, this defendant and his grantors have been in the quiet, peac-able, and lawful possession of said "Aurora mine," and the defendant is now and was ever since said last-mentioned date entitled to said possession.

That the premises in plaintiff's complaint described and set forth are part and parcel of said Aurora mine and not any part of said alleged Bulger Hill placer claims or said Nugget Gulch placer

claims, and that plaintiff is not now and never was entitled to the possession thereof.

14 Wherefore defendant demands judgment.

JOHN G. HEID,
JNO. J. BUNSTINE,
Def't's Att'ys.

UNITED STATES, }
District of Alaska, } *ss:*

William M. Bennett, being duly sworn, says that he is the defendant mentioned in the foregoing answer, and that the facts therein set forth are true, as he verily believes.

W. M. BENNETT.

Sworn and subscribed to before me this 27th day of November, 1888.

[SEAL.] H. E. HAYDON, *Clerk.*

15 In the U. S. District Court in and for the District of Alaska.

GEO. HARKRADER, Pl'f,
vs.
WM. M. BENNETT, for Himself and as Administrator of the Estate of M. Gibbons, Deceased. } Reply.

For reply to the new matter set forth in defendant's answer the plaintiff, replying, says—

That he denies that the defendant's grantor, on the 9th day of April, 1881, or at any other time, located what is now claimed by the defendant as the Aurora mine, situated in Silver Bow basin, Alaska.

Plaintiff denies that since the 9th day of April, 1881, or at all, have they, the defendants, been in the possession of the

16 ground known as the Aurora mine as located by defendants' grantors. Wherefore plaintiffs prays judgment as asked for in his complaint.

A. K. DELANEY,
J. F. MALONEY, AND
A. H. GAMEL, *Pl'f's Att'ys.*

UNITED STATES, }
District of Alaska, } *ss:*

Geo. Harkrader, being first duly sworn, deposes and says: I am the plaintiff mentioned in the foregoing complaint, and that I have heard the said complaint read and know the contents thereof, and that the facts therein stated are true, as I verily believe.

GEO. HARKRADER.

Subscribed and sworn to before me this the 23d day of Nov., 1888.

H. E. HAYDON, *Cl'k.*

17 In the United States District Court in and for the District of Alaska, Special November Term, November 23d, 1888.

In the Matter of GEORGE HARKRADER
vs.
WM. M. BENNETT *et al.* } No. 115.

This cause coming on for trial, A. K. Delaney, A. H. Gamel, and John F. Maloney, Esqs., appearing as attorneys for plaintiff, and J. G. Heid and J. J. Bunstine, Esq., appearing as attorneys for defendants, the venire of the petit jury having been called by the clerk, they were sworn, and, being examined by counsels, the usual challenges having been made, whereupon the jury was sworn to try the issue in this action.

18 *Bill of Exceptions.*

Plaintiff offered to introduce in evidence the record of the following location certificate, marked Exhibit A:

EXHIBIT A.

Notice.—The undersigned claim five hill claims of two hundred feet each frontage and running back one thousand feet, thence running from a stake on the west bank of Ice gulch to a similar stake one thousand feet distant, near the mouth of Quartz gulch.

April 6th, 1881.

TOM LINEHAM.
JOHN OLDS.
TOM KERNAN.
PETE BULGER.
PAT. McGLINCHY.

This company is known as the Bulger Hill Company.

R. DIXON, *Recorder.*

April 8th, 1881.

19 Defendant objects on the ground that said "Exhibit A" is incompetent and void for uncertainty, in that it fails to comply with section 2324 of the United States Statutes, which requires it to contain such "reference to some natural object or permanent monument as will identify the claim."

The court overruled defendant's objection.

To which ruling of the court the defendant excepted then and there.

Plaintiff offered to introduce in evidence the record of the following location certificate, marked Exhibit B:

EXHIBIT B.

Recorded in favor of J. Juneau one claim of 400 feet in length by one hundred feet on each side in width, for mining purposes.

Nugget Gulch, March 19th, 1881.

R. DIXON, *Recorder.*

March 19th, 1881.

20 Defendant objects on the ground that said Exhibit B is incompetent and void for uncertainty, in that it fails to comply with section 2324 of the United States statutes requiring it to contain such a "reference to a natural object or permanent monument as will identify the claim."

The court overruled defendant's objection.

To which ruling of the court the defendant excepted then and there.

Plaintiff offers to introduce in evidence the record of the following location certificate, marked "Exhibit C":

EXHIBIT C.

Recorded in favor of J. Beaudreau one claim of 400 feet in length by 100 feet on each side in width, for mining purposes.

Nugget Gulch, March 19th, 1881.

The above is discovery.

R. DIXON, *Recorder.*

March 19th, 1881.

21 Defendant objected on the same grounds as those stated in objections to Exhibits "A" and "B."

The court overruled the defendant's objection.

To which ruling of the court the defendant excepted then and there.

On behalf of plaintiff testimony was introduced tending to prove—

That the "Bulger Hill" and "Nugget Gulch" mining claims mentioned in Exhibits "A," "B," and "C" were respectively, on the 6th day of April, 1881, & on March 19, 1881, located and staked on their boundaries as the law and the miners' rules and regulations direct.

That during each and every year since said locations were made the yearly assessment work was done on them as the law and the miners' rules and regulations direct.

That on the 20th day of December, 1887, the plaintiff became the owner of them by purchase from original locators.

That said claims comprise the property in controversy in plaintiff's complaint described and set forth.

That on or about the 30th day of November, 1887, the de-
22 fendant filed in the United States land office at Sitka, Alaska, an application for a United States patent to what is known as the "Aurora Lode" mining claim, and that during the month of January, 1888, the plaintiff filed in said land office an adverse claim to said application under and by virtue of section 2326 of the Federal statutes.

That said Aurora Lode claim and plaintiff's placer claims mentioned in Exhibits "A," "B," and "C" conflict to the extent mentioned and described in plaintiff's complaint, and that this suit was brought under and by virtue of section 2326 of the Revised Statutes of the U. S.

On behalf of defendant testimony was introduced tending to prove—

That on the 9th day of April, 1881, M. H. Gibbons, now deceased; John McKinnon, and defendant Bennett located what is known as the "Aurora Lode" mining claim.

That on the same day they marked said claim by placing stakes in the ground so that its boundaries could be readily traced,
23 dug down on the claim until quartz was found, and placed a location notice at the discovery point as the law directs.

That ever since said location was made the necessary assessment work was done on it yearly, as required by law and the miners' rules and regulations.

That the premises in controversy and claimed by plaintiff in this suit are part of the surface ground of said Aurora Lode claim.

That he did not oust plaintiff therefrom.

That the Ice gulch mentioned in Exhibit A is more than a mile in length,

That plaintiff is now and has for more than two years last past been the owner of an undivided two-thirds of said Aurora Lode claim, and that the estate of M. H. Gibbons, deceased, is the owner of the remaining third.

That he is the administrator of the estate of said Gibbons.

That the surface mineral of the ground in controversy was worked out.

24 The defendant asked the court to instruct the jury as follows:

The plaintiff, in his complaint, has alleged that the defendant has ousted him from the premises in controversy and wrongfully withholds possession from him. The plaintiff cannot recover unless he has proven that allegation to the satisfaction of the jury. Ouster means a continuing act of exclusion from the enjoyment of the property.

The court refused to give said instruction to the jury.

To which ruling of the court the defendant then and there excepted.

The defendant asked the court to instruct the jury as follows:

A placer claim comprises only the surface mineral lying within its boundaries, and after such surface mineral is worked off there can be no longer any rightful claim to it as a placer ground unless there be a patent to it from the Government. Therefore, if the jury are satisfied from the evidence in this case that the
25 surface mineral comprised within the boundaries of the property in controversy has been worked off, and that there is no patent to said ground, the plaintiff has no further right to it as a placer ground as against any intervening rights which the defendant may have acquired by virtue of a lode location on the same ground.

The court refused to give said instruction to the jury.

To which ruling of the court the defendant excepted then and there.

The court gave to the jury the following instruction:

You will not be required to consider whether there is any evidence tending to show that the defendants have deprived the plaintiff of the possession of his premises or of any part thereof. That question is not submitted to you. The defendants, Bennett and The Estate of Gibbons, have set up in their answer a right
26 or claim of possession in the lode in the piece of ground in controversy inconsistent with and adverse to the ownership of any rights or placer claims of the plaintiff. Both parties claim ownership of mining claims in and the right of possession to the same piece of ground. This amounts in law to a dispossession of the plaintiff on the part of the defendant, and dispenses with any evidence on that point in the case. As the claims are set up in the pleadings, a dispossession of any part of the property described is a dispossession of the whole of it. You need not ask yourselves, then, whether there is any evidence in regard to the plaintiff's being dispossessed.

To which instruction the defendant then and there excepted.

The court gave the following instruction to the jury:

You have two ultimate questions to consider and those only, namely:

27 (1.) Is the plaintiff the owner of the Bulger Hill and the Nugget Gulch placer claims and entitled to the possession of the soil included within them, and are they located on the grounds as he has described them? Or—

(2.) Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?

To which instruction the defendant then and there excepted.

The court gave the jury the following instruction:

I will submit, as a part of these instructions, a form for your verdict, in case you agree. It is as follows:

"We, the jury, find for the plaintiff,"

Or—

"We, the jury, find for the defendants."

28 To which instruction the defendant then and there excepted.

The jury rendered a verdict in words as follows:

"We, the jury, find for plaintiff.

"R. S. BELKNAP, *Foreman.*"

And thereupon the defendants filed *their* motion in words as follows:

Now comes the said defendant, by his attorneys, and moves that the verdict in the above-entitled cause be set aside and a new trial granted, and for grounds therefor alleges—

1st. That said verdict is irregular in form and void.

2d. That it is contrary to the law and *and* the evidence.

3d. That the court erred in certain rulings during the progress

of the trial and in the charge to the jury, as will more particularly appear by reference to the exceptions taken herein on be-
29 half of the defendant.

The court overruled said motion and entered judgment on the verdict.

To which ruling of the court the defendants then and there excepted.

And thereupon the defendants prayed in open court that *they* be allowed to prosecute a writ of error to the Supreme Court of the United States; which prayer was granted, and, by agreement, the defendant was allowed 60 days in which to present a bill of exceptions.

Now, on this 7th day of January, 1889, the foregoing, after being agreed upon by the parties, is signed by me in open court as the bill of exceptions in the foregoing cause for the purpose of the foregoing writ of error mentioned.

JNO. H. KEATLEY,
Judge Dist. Court of Alaska.

30 Supreme Court of the United States.

GEORGE HARKRADER, Plaintiff,
vs.
WILLIAM M. BENNETT, for Himself and as Administrator of the Estate of M. H. Gibbons, Deceased, Defendant. } Bond.

Know all men by these presents that we, William M. Bennett, for himself and as executor of the estate of M. H. Gibbons, deceased; D. A. Peterson, and H. E. Cutter, are held and firmly bound unto George Harkrader, of Juneau, Alaska, in the sum of five hundred dollars, to be paid to the said George Harkrader, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly & severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

31 Sealed with our seals. Dated this 8th day of December, A. D. 1888.

Whereas the above-named William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the Hon. Jno. H. Keatley, judge of the United States district court for the district of Alaska:

Now, therefore, the condition of this obligation is such that if the above-named William M. Bennett, for himself and as administrator as aforesaid, shall prosecute his said writ of error to effect and answer all costs and damages if he shall fail to make good his plea, then this obligation to be void; otherwise to remain in full force and virtue.

32 W. M. BENNETT. [SEAL.]
D. A. PETTERSEN. [SEAL.]
H. E. CUTTER. [SEAL.]

UNITED STATES DISTRICT COURT, *District of Alaska,* } *ss:*

D. A. Pettersen and H. E. Cutter, whose names are subscribed as sureties to the within bond, being severally duly sworn, each for himself deposes and says that he is a resident of Juneau, in said district of Alaska; that he is worth the amount for which he becomes surety on said bond, over and above all debts and liabilities, in unencumbered property situated within this district, exclusive of property exempt from execution and forced sale.

D. A. PETTERSEN.
H. E. CUTTER.

Subscribed and sworn to before me this 8th day of December, 1888.

[SEAL.] H. E. HAYDON, *Clerk.*

Filed and approved December 8th, 1888.

H. E. HAYDON, *Clerk.*

33 United States District Court, District of Alaska.

GEORGE HARKRADER, Plaintiff,
vs.
WILLIAM M. BENNETT, for Himself and as Administrator of the Estate of M. H. Gibbons, Deceased, Defendant. } Affidavit.

William M. Bennett, being duly sworn, says he is the defendant in the above-entitled cause.

That he is well acquainted with the property in controversy in the above-entitled cause, and that the said property is of the value of more than five thousand dollars.

W. M. BENNETT.

Subscribed and sworn to before me this 7th day of December, 1888.

[SEAL.] H. E. HAYDON, *Clerk.*

34 THE UNITED STATES OF AMERICA, *District of Alaska,* } *ss:*

I, Henry E. Haydon, clerk of the United States district court for the district of Alaska, do hereby certify that the foregoing copy of the record and proceedings in the case of George Harkrader *vs.* William Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, has been by me compared with the original, and that it is a correct transcript therefrom as the same appears of record at my office and in my custody.

Seal United States District Court, Alaska.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sitka, in said district, this 8th day of January, 1889.

HENRY E. HAYDON, *Clerk,*
By —— ——, *Deputy Clerk.*

35 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the district of Alaska, Greeting:

Because in the records and proceedings and also in the rendition of the judgment of a plea which is in the said district court, before you, between George Harkrader and William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, a manifest error hath happened, to the great damage of the said William M. Bennett, for himself and as administrator of the estate of M. Gibbons, deceased, as by this complaint appears, we, being willing that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October next, in the Supreme Court to be then

36 and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 20th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

Seal United States District Court, Alaska.

HENRY E. HAYDON,
Clerk United States District Court in and for the Dist. of Alaska.

37 [Endorsed:] In the United States dist. court, dist. of Alaska. George Harkrader *vs.* William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased. Writ of error.

38 THE UNITED STATES OF AMERICA, *ss:*

To George Harkrader, Greeting:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error sued out of said court to the district court of the United States for the district of Alaska, wherein William M. Bennett, for himself and as administrator of the estate of M. H. Gibbons, dec., is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville Weston Fuller, Chief Justice of the said Supreme Court of the United States, this 20th day of August, in the year of our Lord one thousand eight hundred and eighty-nine.

JNO. H. KEATLEY,
Judge Dist. Court of Alaska.

39 [Endorsed:] Wm. M. Bennett *et al.*, pl'ff in error, *vs.* George Harkrader, def't in error. Citation. Service of a copy of the within citation is hereby admitted, after filing, this 22nd day of August, 1889. Farrel & Malony and H. K. Delany, att'y- for d'f't in error.

Endorsed on cover: Case No. 14,411. Alaska D. C. U. S. No. 347. William M. Bennett, for himself and as administrator of M. H. Gibbons, deceased, plaintiff in error, *vs.* George Harkrader. Filed November 7, 1890.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judge of the district court of the United States for the district of Alaska, Greeting:

[Seal of the Supreme Court of the United States.]

Whereas in a certain suit in said district court between George Harkrader, plaintiff, and William M. Bennett, for himself and as administrator of M. H. Gibbons, deceased, defendant, which suit was removed to the Supreme Court of the United States by virtue of a writ of error agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

"That the clerk of said district court in transmitting the record of this cause to the clerk of this court failed to incorporate a copy of the judgment entry in said cause:"

You, therefore, are hereby commanded that, searching the record and proceedings in said cause, you certify what omissions, to the extent above enumerated, you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 12th day of March, A. D. 1894.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

At a term of the United States district court for the district of Alaska begun and held at Juneau, in said district, and commencing on the 19th day of November, A. D. 1888, and on the 5th day of December, A. D. 1888, being the fourteenth day of said term.

Present: The Hon. John H. Keatley, judge.

GEORGE HARKRADER, Plaintiff,
vs.
WILLIAM BENNETT, for Himself and as the Administrator of the Estate of M. Gibbons, Deceased, Defendant.

This cause having been duly reached in the order of the calendar, and the plaintiffs having appeared by *their* counsel, A. K. Delaney, A. H. Gamel, & J. H. Maloney, and the defendant by John C. Heid and John J. Bunstine, and all parties being ready for trial, a jury was duly empaneled and sworn to try the issues of fact presented by the amended pleadings on file, and *and* the cause having been duly tried by such jury upon such issues and duly submitted to them after argument of counsel and the charge of the court, and such jury having on the 30th day of November, A. D. 1888, found for the plaintiff and rendered in open court their verdict that the plaintiff is entitled to the possession of the certain placer claims set forth in the plaintiff's amended complaint, which said placer claims

are known as Bulger Hill and the Nugget Gulch placer claims, situate in Silver Bow basin, Harris mining district, Alaska, the said Bulger Hill placer claims being described as follows, to wit:

Commencing at post No. 10 of the U. S. survey known and recorded as the Bulger Hill survey, whence United States mineral monument No. 2, duly established by United States survey and recorded as a permanent monument, bears north seventy-six degrees (76°) east eleven hundred and seventy-eight (1178) feet, thence running north thirty-four degrees and *and* forty-five minutes (34° 45′) east one thousand feet (1,000) to angle No. 1, thence running south twenty-two degrees (22°) east two hundred feet (200) to angle No. 2, thence south forty-one degrees and *and* thirty minutes (41° 30′) east five hundred and ninety-four (594) feet to angle No. 3, thence running south thirty-seven degrees and thirty minutes (37° 30′) west nine hundred and ninety (990) feet to angle No. 4, thence north thirty-six degrees and fifteen minutes (36° 15′) west seven hundred and thirty-seven (737) feet to place of beginning; and the said Nugget Gulch placer claim being described as follows, to wit:

Commencing at angle No. 2 mentioned and described in the foregoing description of the Bulger Hill placer claims, thence running south forty-one degrees and thirty minutes (41° 30′) east two hundred feet, thence south fifty-seven degrees and forty-five minutes (57° 45′) west two hundred and thirty-eight (238) feet, thence south thirty-nine degrees (39°) west five hundred and sixty-two (562) feet, thence running north forty-one degrees and thirty minutes (41° 30′) west two hundred feet, thence north thirty-nine degrees (39°) east five hundred and sixty-two (562) feet, thence running north fifty-seven degrees and forty-five minutes (57° 45′) east two hundred and thirty-eight (238) feet to place of beginning; and the defendant having filed a motion for a new trial and exceptions to the instructions of the court, and the same having been overruled, and to which ruling the defendant excepts:

Now, therefore, on motion of counsel for the plaintiff, it is hereby ordered and adjudged and decreed that the said plaintiff have and recover of the defendant the possession of the above-described placer mining claim, and that the plaintiff have full restitution thereof, and that the plaintiff have and recover of the defendant the costs and disbursements of this action, to be taxed.

By the court:

JOHN H. KEATLEY,
Judge District Court, Alaska.

THE UNITED STATES OF AMERICA, }
District of Alaska, } *ss:*

I, N. R. Peckinpaugh, clerk of the United States district court for the district of Alaska, do hereby certify that the foregoing copy of *of* the decree in the case of George Harkrader *vs.* Wm. M. Bennett, for himself and as administrator of the estate of M. H. Gibbons, deceased, case No. 115, has been compared with the original, and that it is a correct transcript therefrom and of the whole of such origi-

nal as the same appears of record and on the files at my office and in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Sitka, in said district, this 1st day of December, 1890.

[Seal United States District Court, Alaska.]

N. R. PECKINPAUGH, *Clerk.*

[Endorsed:] No. 115. In the U. S. dist. court, dist. of Alaska. George Harkrader *vs.* W. M. Bennett. Decree. Filed Dec. 5th, 1888. H. E. Haydon, clerk.

[Endorsed:] Case No. 14,411. Supreme Court U. S., October term, 1893. Term No., 347. William M. Bennett, pl'ff in error, *vs.* George Harkrader. Writ of certiorari and paper filed as return thereto. Filed March 12, 1894.

158-491

IN THE

Supreme Court of the United States

OCTOBER TERM, 1898.

WILLIAM M. BENNETT,
FOR HIMSELF AND AS ADMINISTRATOR OF M. H. GIBBONS, DECEASED, *Plaintiff in Error*,

vs.

GEORGE HARKRADER.

No. 347.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN H. MITCHELL,
M. B. GEARY,
D. A. McENERNEY,
Attorneys for Plaintiff.

LAW REPORTER PRINT.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1893.

WILLIAM M. BENNETT,

FOR HIMSELF AND AS ADMINISTRATOR OF M. H. GIBBONS, DECEASED, *Plaintiff in Error*,

vs.

GEORGE HARKRADER.

No. 347.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ALASKA.

STATEMENT OF CASE.

This is an action of ejectment instituted and tried in the District Court of the United States for the District of Alaska, and involved the title and right to the possession of conflicting mining claims in that Territory.

The plaintiff's suit was brought in support of an adverse claim filed in the United States Land Office at Sitka, Alaska, against the entry by the defendants of a certain lode mining claim, located as the Aurora Lode.

The complaint in substance alleged, that the plaintiff was "lawfully possessed of, and now is entitled to, the possession of those certain placer mining claims situate, lying and being in Silver Bowbasin, Harris Mining District, District of Alaska, known as the Bulger Hill and Nugget Gulch placer mining claims", particularly describing the same by metes and bounds, and alleges the *ouster* by the defendants and prays judgment for the recovery of the said premises (Pages 2 and 3 of the Record).

The defendants by their answer deny the material allegations of the complaint, and set up an affirmative claim of title to the same premises, by virtue of a lode mining location known as the "Aurora mine", made thereon in compliance with the laws of the United States and the rules and regulations of Harris Mining District. (Pages 10 and 11 of the Record.)

Upon the trial of said cause the plaintiff offered in evidence the record of three (3) certain location certificates, marked, respectively, Exhibits "A", "B" and "C", to the admission of which the defendants objected, which objections were overruled by the court, and the same were admitted as evidence to be considered by the jury in said cause. (See pages 6 and 7 of the Record.)

It is contended by the plaintiffs in error that this ruling of the court was erroneous, and the same is assigned as error.

On the trial of said cause, and after the evidence had been closed, the defendants in the court below requested the court to charge the jury as follows:—

> "A placer claim comprises only the surface mineral lying within its boundaries, and after such surface mineral is worked off there can be no longer any rightful claim to it as a placer ground unless there be a patent to it from the Government. Therefore if the jury are satisfied from the evidence in this case that the surface mineral comprised within the boundaries of the property in controversy has been worked off, and that there is no patent to said ground, the plaintiff has no further right to it as a placer ground as against any intervening rights which the defendant may have acquired by virtue of a lode location on the same ground,"

which instruction the court refused to give or modify, and such refusal the plaintiff in error assert was erroneous and prejudicial to their rights. (See page 8 of Record.)

The court of his own motion gave to the jury two instructions as follows:—

> "(1) Is the plaintiff the owner of the Bulger Hill and the Nugget Gulch placer claims and entitled to the possession of the soil included within them, and are they located on the ground as he has described them? Or—
>
> "(2) Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?" (See page 9 of the Record.)

The plaintiffs in error contend that each of said instructions was wrong, and did not embody the law governing the case, and was liable to mislead the jury.

The verdict of the jury was in favor of the plaintiff. After the same had been rendered, the defendants filed in said court their motion for a new trial for the following reasons:—

"1st. That said verdict is irregular in form, and void.

"2d. That it is contrary to the law and the evidence.

"3d. That the court erred in certain rulings made during the progress of the trial in the charge to the jury, as will more particularly appear by references to the exceptions taken herein on behalf of the defendant." (Pages 9 and 10 of the Record.)

This motion for a new trial the court overruled, and entered judgment on the said verdict in favor of the said plaintiff.

Assignment of Errors.

FIRST. That the court below erred in admitting in evidence the record of location certificate, marked Exhibit "A", over the objections of the plaintiffs in error.

SECOND. That the court erred in admitting in evidence the record of location certificate, marked Exhibit "B," over the objections of the plaintiffs in error.

THIRD. That the court erred in admitting in evidence the record of location certificate, marked Exhibit "C", over the objections of the plaintiffs in error.

FOURTH. That the court erred in refusing to give to the jury the following instruction asked for by the plaintiffs in error :—

> "A placer claim comprises only the surface mineral lying within its boundaries, and after such surface mineral is worked off there can be no longer any rightful claim to it as a placer ground unless there be a patent to it from the Government. Therefore, if the jury are satisfied from the evidence in this case that the surface mineral comprised within the boundaries of the property in controversy has been worked off, and that there is no patent to said ground, the plaintiff has no further right to it as a placer ground as against any intervening right which the defendant may have acquired by virtue of a lode location on the same ground".

FIFTH. That the court erred in instructing the jury over the objections of the plaintiffs in error as follows :

> "Is the plaintiff the owner of the Bulger Hill and the Nugget Gulch placer claim, and entitled to the possession of the soil included within them, and are they located on the grounds as he has described them?"

SIXTH. That the court erred in giving the following instruction to the jury of his own motion :

> "Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?"

SEVENTH. That the court erred in entering judgment in favor of the plaintiff on the verdict of the jury rendered in said cause.

Argument.

The plaintiff in the court below, for the purpose of establishing the validity of his placer location, offered in evidence the record of the location certificate (Exhibit "A"), to the introduction of which the defendants, by their counsel, objected, on the ground that the same was incompetent and void for uncertainty. Exhibit A is as follows:

> "Notice.—The undersigned claim five hill claims of two hundred feet each fronting and running back one thousand feet, thence running from a stake on the west bank of Ice gulch to a similar stake one thousand feet distant, near the mouth of Quartz gulch. April 6th, 1881.
>
> TOM LINEHAM.
> JOHN OLDS.
> TOM KERNAN.
> PETE BULGER.
> PAT MCGLINCHY.
>
> This company is known as the Bulger Hill Company.
> R. DIXON, Recorder."
>
> April 8th, 1881.

After the introduction of Exhibit A over the objections of the defendants, the plaintiff introduced in evidence in the court below the record of the location certificates, marked Exhibits "B" and "C", to the introduction of which the defendants objected, and the same were admitted over their objections, and this ruling of the court is assigned as a ground of error, and error which should require a reversal of the judgment entered in said cause.

Section 2324 of the Revised Statutes of the United States provides "that the location must be distinctly marked on the ground, so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name, or names, of the locators, the date of the location,

and such a description of the claim, or claims, located by reference to some natural object, or permanent monument, as will identify the claim."

Section 2329 of the Revised Statutes provides for the location and entry of placer claims "under like circumstances and conditions and upon similar proceedings as provided in vein or lode claims."

Sections 2330–31 provide for the manner of location of placer claims on the surveyed public lands, requiring in such cases that the location shall conform to the legal subdivisions, so that in the location of placer claims, if upon surveyed land, the calls of the location certificate will conform simply to the government subdivisions; but where locations are made upon unsurveyed public lands, then a different rule prevails, and the location must be distinctly marked on the ground, and the location-certificate must contain a description of the claim by reference to natural objects and permanent monuments as will identify the claim. Some provision of this kind is absolutely essential. The land must be identified before it can be segregated from the balance of the public domain; and in the absence of a system of surveys the only method of identification is to tie the location to some natural object or permanent monument, for the purpose of identifying it.

The location-certificate offered and received in evidence is wholly defective in this particular, and absolutely means nothing. The initial point of measurement is not stated. The claims front on *something;* but what natural object is not designated? They run back in an unknown course for a distance of one thousand feet, and then run in some direction not mentioned from a stake, on the west bank of Ice gulch to a similar stake one thousand feet distant, located near the mouth of Quartz gulch.

The evidence shows that Ice gulch is about one mile in length, but the length of Quartz gulch is not given. No surveyor could locate this claim, nor could a miner, honestly

desiring to ascertain the metes and bounds of the claim, derive any information whatever from a perusal of this remarkable record. The description in Exhibits B and C, if possible, is still more uncertain. There is no attempted reference to any natural object or permanent monument. The place of the *execution* of the instrument is Nugget gulch, but there is no allegation that the claim itself is located in this gulch, or even in the Territory of Alaska.

It is useless to discuss the requirements of the statute relative to location certificates. The matter has frequently been passed upon by the courts. Thus a description in a location certificate as follows: "Situated on the north side of Iowa gulch about timber line on the west side of Bald Mountain. Said claim is known and marked as the law requires" was held void.

Faxon *vs.* Bernard, 4 Fed. Reporter, 702.

Mr. Justice Field in the case of Hammer *vs.* Garfield Mining and Milling Company, 130 U. S., 301, said:

> "Section 2324 of the Revised Statutes, which went into effect on the first of December, 1873, provides that records of mining claims subsequently made 'shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument as will identify the claim'. These provisions, as appears on their face, are designed to secure a definite description—one so plain that the claim can be readily ascertained. A reference to some natural object or permanent monument is named for that purpose. Of course the section means, when such reference can be made." * * *

The description of the property contained in each of the location certificates offered in evidence is wholly variant from the descriptions given in the complaint, of the property in dispute. The inception of plaintiff's chain of title are these location certificates, and his deeds must relate

back, and have their inception in the location certificates. If these certificates are void for uncertainty, and do not segregate the premises in dispute in this case from the public domain, then the plaintiff has failed to make out a case, and the jury should have been instructed to have found against the plaintiff.

Fourth Assignment of Error.

The instruction which defendants' counsel requested the court to give, and which was refused, cannot be taken as a model, and a portion of this instruction is immaterial. It makes no difference, so far as the rights of the parties are concerned, whether the surface ground "has been worked off', or whether the same then contained valuable minerals, such as is usually found in slide or debris. The plaintiff was claiming the premises by virtue of a placer location. The defendants were claiming the same as a lode location; therefore the plaintiff had no right whatever to this ground "as against any intervening rights which a defendant may have acquired by virtue of a lode location on the same ground". So that the material part of this refused instruction is found in the latter portion thereof, and correctly embodies the legal principle involved, namely, that if a lode location had intervened as against a placer location, the lode location would be the superior title.

The defendants' rights in the premises were greater than those called for in the instruction, and they were entitled to have the material portion of said instructions given.

Fifth and Sixth Assignments of Error.

The court gave of his own motion two instructions to the jury, and expressly limited their investigation to these questions, and neither of them correctly embodies the prin-

ciples of law governing in such cases. In the first instruction the language of the court is as follows:—

> "Is the plaintiff the owner of the Bulger Hill and the Nugget gulch placer claims and entitled to the possession of the soil included within them, and are they located on the ground as he has described them?"

The first portion of this instruction is an assumption by the court that there is a placer claim known as "Bulger Hill and Nugget gulch placers," and the jury could naturally infer from this instruction that their inquiry should be directed to determine the fact whether the plaintiff had acquired by conveyance the interest possessed by his grantors in this alleged property. The interrogation does not logically involve the question of the validity of the placer claim, but virtually assumes that there exists such location. The latter portion of the instruction suggests a question to the jury to determine, namely, whether the plaintiff is entitled to the possession of the soil included within these placers. The instruction does not direct their attention to the *manner* in which the right to the possession of the soil can be determined. There is nothing to indicate to the mind of the jury that one of the first questions to determine was the *validity* of the *location* itself. The entire instruction is misleading, and should never have been given.

The second instruction, which defines the rights of the defendants, is as follows:

> "Are the defendants the owners of the Aurora lode and entitled to the possession of the soil embracing it, and is it situated on the ground called for in the description in their answer?"

There is nothing in this instruction which would indicate to the mind of the juror that it was a material question for them to determine, whether a valid lode location had been made upon the premises in dispute, and, if so, the

locator of the lode claim would be entitled to recover the premises by virtue of this lode location. The court does not indicate to the jury the manner, or process, by which they can determine the question as to the right of possession of the soil in which the lode is located.

In cases of this character the instructions usually given by courts define the nature and character of these locations, and point out the method by which the jury can ascertain certain ultimate facts which it is their province to find. On the controlling questions in this case the court is wholly silent, and the instructions are well calculated to mislead and befog the jury. By these instructions the court limited their investigation to two questions, whilst the Act of Congress approved March 3, 1881, in substance, provides that if any title to the ground in controversy shall not be established by either party, the jury should so find. This statutory provision the court absolutely excluded from the consideration of the jury. The premises in dispuse are either owned by the parties-litigant in the court below, or the same had not been segregated from the public domain, and was still a part and parcel thereof, and the inquiry of the jury should not have been limited simply as to the rights of the plaintiff and the defendants to the area in dispute. This Act of Congress means something, and a court should not refuse to give the same in a charge to the jury. As to the construction of this statute the attention of the court is called to the case of Jackson *vs.* Roby, 109 U. S., 440. Rosenthal *vs.* Ives, 12 Pacific Rep., 904.

It may be contended that the defendant could not invoke the statute for the maintenance of his rights, as title in a third person had not been pleaded as a defense. The statute does not make it necessary. While the statute is make primarily for the benefit of the Government, it may in effect protect the party in possession.

If the jury had believed from the evidence that neither the plaintiff or defendant had made a valid location, then

they should have been permitted to have so found, and such finding would have left the *actual* possession in the defendant.

Counsel for the plaintiffs in error insist that the judgment entered in this cause should be reversed and the case remanded for new trial.

Seventh Assignment of Error.

The general laws of the State of Oregon, not in conflict with the laws of the United States, have been by Congressional enactment made applicable to the Territory of Alaska. The 7th Section of the Act of Congress, approved May 17, 1881, 23 Stat. L., is as follows:—

> "The general laws of the State of Oregon, now in force, are hereby declared to be the law in said district, so far as the same may be applicable and not in conflict with the provisions of this act or of the laws of the United States." * * *

The State of Oregon has provided by statute the manner in which the title to real estate, and the right to the possession thereof, may be determined, and points out the essential requisites of the pleadings of the respective parties to an action of this character, and also the requisites of the verdict of the jury which tries the case.

The law of that State is as follows:

> "HILL'S ANNOTATED LAWS OF OREGON.
>
> "Sec. 316. Any person who has a legal estate in real property, and a present right to the possession thereof, may recover such possession, with damages for withholding the same by an action at law." . . .
>
> "Sec. 318. The plaintiff in his complaint shall set forth the nature of his estate in the property, whether it be in fee, for life, or for a term of years, and for whose life, or the duration of such term, and that he is entitled to the possession thereof, and that the defendant wrongfully withholds the same from him to

his damage such sum as may be therein claimed. The property shall be described with such certainty as to enable the possession thereof to be delivered, if a recovery be had."

Sec. 320 is as follows:—

"The jury by their verdict shall find as follows: First, if the verdict be for a plaintiff, that he is entitled to the possession of the property described in the complaint, or some part thereof, or some undivided share or interest in either, the nature and duration of his estate in said property, the parts thereof, or undivided share or interest in either, as the case may be."

Where a statute provides a particular remedy and certain findings which the jury must make, then the provisions of the statute are mandatory, and courts are powerless to proceed in any manner save that indicated by the statute. Thus under the statutes of Oregon, providing for the recovery of specific personal property, which was in language following:

"If the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if the verdict be in favor of the plaintiff. * * *"

The Supreme Court of that State held that where the verdict was general, and for damages alone, it was not a compliance with the statute, and that no judgment could be rendered thereon.

Says the court:

"When the statute directs a special verdict, the court will not render judgment on a general verdict, for it is not decided by it how the special issues are determined."

Jones *vs.* Snyder, 8 Oregon, 127.

A similar statute of the State of Florida, approved February 22, 1881, has been construed by this court. Section 4 of said act is as follows:

> "The verdict in actions of ejectment shall, when for the plaintiff, state the quantity of the estate of the plaintiff, and describe the land by its metes and bounds, by the number of the lot, or other certain description * * *"

Chief Justice Waite, in construing this statute, said:

> "This was an action of ejectment, and the verdict, which was for the plaintiff, did not state the quantity of the estate, or describe the land. This is assigned as error, among others, and Perry, the defendant in error, in the brief which has been filed in his behalf, confesses that the judgment in his favor is thereby vitiated. Without considering any of the other errors assigned, thereupon we reverse the judgment on this ground alone and remand the case for a new trial."
>
> Pensacola Ice Company *vs.* Perry, 120 U. S., 319.

The essential requirements of the verdict of the jury, as provided for by the statutes of Oregon, have not been met in this case, and if this statute is not merely directory, then the verdict is not sufficient to sustain a judgment. The court over the objections of the defendant instructed the jury as to the form of the verdict, and the jury were compelled to return a general verdict not in compliance with the statute. The defendant objected to entry of judgment upon this verdict, and the record of exceptions is fully preserved upon this point.

Counsel for plaintiffs in error therefore insist that the judgment rendered in this cause in the court below should be reversed and the case remanded for a new trial.

JOHN H. MITCHELL,
M. B. GERRY,
D. A. MCKNIGHT,
Attorneys for Plaintiffs in Error.



158
158-445

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 58.

WILLIAM M. BENNETT, ETC., PLAINTIFFS IN ERROR,

vs.

GEORGE HARKRADER, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

H. W. BLAIR,
OSCAR FOOTE,
S. F. PHILLIPS,
F. D. MCKENNEY,
For Harkrader.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 58.

WILLIAM M. BENNETT, ETC., PLAINTIFFS IN ERROR,

vs.

GEORGE HARKRADER, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

The parties will be designated in this brief by their titles in the court below, in which Harkrader was *plaintiff* and the plaintiffs in error were *defendants*.

The action was brought, under section 2326 of the Revised Statutes and section 8 of the statute of 1884 (ch. 53), in order to vindicate the plaintiff's right of possession to a certain mining claim situated in Alaska, as against an ejectment therefrom by the defendants.

The latter statute is as follows (see 23 Stat., 24; *Supplement*, 431):

"SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka.

* * * * * * *

"And the laws of the United States relating to mining claims and the rights incident thereto shall from and after the passage of this act be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President:

"*Provided*, That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

"*And provided further, That parties who have located mines or mineral privileges therein under the laws of the United States, applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid.*

* * * * * *

"But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

The general theory upon which this action has been brought is that although in March and April, 1881, at the time when the locations in question were made, there was no statutory land law in Alaska, still certain *miners' rules* were in force there, and that the plaintiff had thereupon proceeded to locate his claims under the latter, as it was supposed he well might. For, to quote from a late case upon this subject,—in Glacier Mining Co. *vs.* Willis, 127 U. S. 471, 482, this COURT, citing several preceding cases upon the same matter, said:

"The land department of the Government and this Court also have always acted upon the rule that all mineral locations were to be governed by the local rules and customs in force at the time of the location, where such location was made prior to the passage of any mineral law by Congress."

This is familiar doctrine in this COURT and, we suppose, need not be referred to again. It was upon this theory, also, that the court below administered the action; and whilst it may reasonably be argued that even under statutory law the locations put in evidence in the present case were competent, and also that the case made by the plaintiff merely as an *occupier* and *possessor* (see statutory provision above) would render the form of the location immaterial, yet the exact case as expressly made below was that, in the absence of a land-law statute, it was competent for miners to make rules, and that under such a state of things conformity, *by a sort of anticipation*, to the provisions of section 2324 of the Revised Statutes was unnecessary, *the retrospective portion* of the act of 1884 intending to require conformity to provisions of *law* about locations *in the usual way*, viz., to provisions by *miners' rules*, if any, and, if not any, to provisions by some United States *statute*. In other words, if the present claimant had followed the general provisions of some United States statute *then in force elsewhere than in Alaska* (say section 2324):—then, under such retrospective portion, this would be valid; but, if not, then it would be enough that he had followed those of miners' rules in force within the locality where the location had taken place. The retrospective statute did not intend to dislocate any title theretofore established, but only to give a remedy in the absence of any such *establishment*.

The action began with a complaint that upon the 10th of December, 1887, the plaintiff had been ejected by the defendants from certain placer mining claims in Alaska, of which he had been in quiet and peaceable possession since the *8th* of April, 1881.

The defendants answered that upon the *9th* of April, 1881,

they had located a lode mining claim upon the same land in compliance with the laws of the United States and the miners' rules in force at the locality in question, and had ever since been in quiet, peaceable, and lawful possession thereof; and, besides, they denied every material allegation in the complaint.

The plaintiff replied, denying the *location* and also the *peaceable possession*, in the answer stated.

At a trial of the issues joined the plaintiff had a verdict, and judgment was rendered accordingly.

The case comes up upon certain errors alleged in a bill of exceptions, in regard to the reception of evidence, and to instructions given to the jury.

The learned counsel for the defendants make seven assignments of error, of which the three first concern the admission of the records of the three locations asserted by the plaintiff,—Exhibits A, B, C; whilst the fourth concerns a refusal by the court to give an instruction which had been asked; the fifth and sixth—the giving instructions that had been objected to; and the seventh—the form of the verdict and judgment.

Before arguing these, we submit as a preliminary point, that the writ of error should be dismissed for failure to give the bond therefor by law required, viz., one approved by the judge of the court below.

Haskins *vs.* St. Louis R. Co., 109 U. S., 106, citing previous authorities.

Supposing it possible that in this we may be mistaken, we proceed to notice the assignments of error above specified.

The first three assignments relate to the admission of certain exhibits. The objection thereto as stated to the court below (Record, folios 19 to 20) was that the exhibits were each "void for uncertainty in that *they* failed to comply with section 2324 United States Revised Statutes, requiring *them* to maintain such a reference to a natural object or permanent monument as will identify the *claims*."

Both the plaintiff and the defendants founded themselves at the trial, in some respects, upon "Miners' rules and regulations" in force at the locality in question on and after the dates of the locations under consideration (folios 21 and 23). We submit that the reason assigned below by the defendant for rejecting the exhibits was insufficient, for, as already suggested, even if the exhibits had failed to comply with section 2324, this would have been no reason for rejecting them. Their form should have been brought to the test of the *Miners' rules* of that district, which, under the circumstances, made part of that "law" recognized retrospectively by the statute of 1884, above given. The validity of the exception to their introduction as evidence stands or falls with that of the reason suggested to the court in maintenance thereof. (1 Thomp. Trials, section 693.)

But even if the defendants had a right to bring those exhibits to the standard prescribed in section 2324, still, inasmuch as all that they objected to as showing that the exhibits should be excluded was their failure to refer to a "natural object" or "permanent monument," so as to identify the claim, we submit that the words "*Nugget Gulch*" and "*the west bank of Ice Gulch*, 1,000 *feet from a certain stake*

near the mouth of Quartz Gulch," in the connection in which they occur, establish such reference. The point presented by the objection in question is not as to any supposed infirmity in the character of the locations *irrespective of a reference*, etc. What the statute required was, amongst other things, that the locator should limit the sphere of inquiry on the part of future investigators by means of a *natural object*, etc. The statute rendered such reference *one* necessary element. It exists in this case. If the location had been impeachable otherwise than upon this point, the attention of the court was not drawn to that as a ground of *exclusion*.

In this connection it is to be noted that only *detached portions* of such evidence as was introduced upon the trial and of such instructions as were given to the jury, are presented in the record. It is to be presumed that all other instructions given were correct, and that these duly led up to those portions which are excepted to, so that the matters excepted to are exceptionable (if at all) only because of the special characteristics mentioned; in which case a propriety to be presumed in other instructions would not compensate the deficiency.

The FOURTH assignment of error seems to be practically abandoned by the learned counsel for the defendants. We understand them to admit that the instruction there spoken of is defective *as asked*, and that they suggest that the court erred in not giving that part of this which, as they say, was correct. But the court was under no duty to make such a distribution of the proposition which the defendants suggested at the trial. (2 Thomp. Trials, sec. 2349.)

In arguing the FIFTH and SIXTH assignments together, it is suggested on behalf of the defendants that the questions put to the jury *limited* their inquiry to the matters in such questions contained. But it is submitted that such questions were not "instructions," and otherwise did not limit the inquiry of the jury, but appear to be a natural and usual summing up of preceding general instructions so as to present compactly the vital issues betwixt the parties in the way suggested in the statutes which authorize the action. As already said, the record does not profess to give more than such detached portions of the instructions as concern two detached exceptions to passages therein. No improper omission as to the other instructions can be assumed in the absence of a record of the whole of these.

The SEVENTH error is as to the form of the judgment taken in connection with the verdict.

This error is grounded upon forms of procedure in an Oregon statute which has been adopted for Alaska.

But upon the particular point in question *specific* provisions in the United States statute practically except suits like that under consideration from provisions in the Oregon statute that otherwise would be applicable. Suits like that before the Court make a part of the general law in regard to the public lands of the United States, and are intended to furnish a guide for action in the Land Department when issuing patents. By the assumption which underlies these suits the parties have no "estate" whatever in the lands, but only a claim for a patent, more or less valid. The suit becomes *functus officio* when the comparative value of the respective claims has been ascertained. And then the rest of the proceedings are adjourned to the General Land Office. The verdict as explained by the pleadings warrants the